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IN THE

Supreme Court of the United States

October Term, 1949.

No. 734.

NATHAN R. ALLTMONT and CHARLES O'NEILL,
Petitioners,

v.

UNITED STATES OF AMERICA, UNITED STATES MARITIME COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of NATHAN R. ALLTMONT and CHARLES O'NEILL respectfully shows to this Honorable Court as follows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioners, American Merchant seamen, brought these actions to recover damages and maintenance and cure because of personal injuries sustained while members of the crew of the S. S. "Cedar Mills", a vessel owned and operated on behalf of the United States.

The libels filed by petitioners allege that on November 19, 1945, the S. S. "Cedar Mills" was at or near the port of Ancona, Italy, when it suddenly suffered a violent explosion allegedly due either to the negligent navigation into a mine or mines, or to a defective condition of the boilers. Petitioners were among those injured as a result of the explosion (R. 6a-9a).

After the institution of suit, petitioners served interrogatories upon the respondent calling for the disclosure of all facts having any relevancy to the proceedings and for copies of statement of the witnesses (R. 12a, 23a). Respondent objected to the interrogatories upon the ground that they were burdensome and in effect, required the Government to prepare the libellants' cases. No claim of privilege or immunity was raised at this point. The Court overruled the objections and ordered the interrogatories to be answered within thirty days. Respondents failed to comply with this order and the Court thereupon entered another order to compel the respondents to make answer to the interrogatories. Thereafter respondents filed incomplete answers to the interrogatories and did not disclose all of the information within their possession (R. 14a, 26a). It appeared that two independent investigations had been made by different departments of the Government; the first investigation was made by the United States Coast Guard shortly after the disaster and was directed primarily to the conduct of the ship's personnel with the view to determining whether any disciplinary action was warranted; the second investigation was conducted by the Federal Bureau of Investigation and was specifically directed to the defense of the lawsuits arising out of the disaster (R. 157a). Respondents furnished copies of the statements obtained by the Coast Guard investigation but declined to furnish statements of witnesses taken by the F. B. I. agents or the information contained therein (R. 157a-158a).

The Coast Guard investigation had developed that the explosion was possibly due to contact with external mines or to an explosion of the boilers in the engine room; that at

the time of the explosion there was no lookout posted and the degaussing apparatus was not turned on (R. 153a).

It is respondents' position that the explosion was due to an accoustical mine which is buried in the ocean bed and is set off by the propellers; that it was therefore immaterial that the degaussing apparatus was not turned on. Petitioners therefore contended that it was most essential to have all the information developed by the F. B. I. investigation, which, it may be assumed was directed, inter alia, to the development of information related to this defense. In order to avoid this disclosure, the respondents, after the Court had entered its second order to compel disclosure, filed a claim of privilege through the Attorney General and contended also that the information need not be disclosed because the statements represented the "work product" of the Government's lawyer and, that, in any event, copies of the statements need not be disclosed under Rule 31 without any showing of good cause.

The Opinion of the District Court.

The Trial Judge ruled against the respondents with respect to all three contentions. As to the copies of statements in answer to interrogatories, the Trial Judge held that the disclosure of a copy of a statement involved no more than a disclosure of the information which was contained therein and was required to be disclosed in its entirety under the decision of the Supreme Court in *Hickman v. Taylor and Anderson et al.*, 329 U. S. 495. The Trial Judge pointed out that to adopt the respondents' contention would in practical effect, permit a party to paraphrase and edit a witness' statement thereby inviting omissions, distortions and misrepresentations; that the proper manner to insure complete and honest disclosure required the party to set forth a verbatim copy of the statement (R. 179).

Concerning the claim of privilege, the District Court held that there was nothing in these cases which involved

State secrets or other matters, the publication of which might embarrass or harm the Government in its diplomatic relations, military operations or measures for national security (R. 179).

With respect to the contention that, the information asked for is protected from discovery by the Supreme Court's decision in *Hickman v. Taylor,* because the F. B. I. agents are lawyers, the Court held that while some of the F. B. I. agents may have been lawyers, the relationship between them and the Government has nothing remotely in common with the relationship between a lawyer and his client, and accordingly, the Government could not invoke the limited protection afforded by the Hickman case (R. 179).

The respondents also contended that the Attorney General, personifying the executive branch of the Government, is free to refuse disclosure of any evidence in his possession regardless of its character for any reason which may seem to him sufficient, because of the independence of the three coordinate branches of the Government. In answer to this contention the Court held, in view of the Suits in Admiralty Act, the Attorney General is put to a choice between refusing to make disclosure or run the risk of losing the law suit. The Court said in this connection "the Attorney General's choice is merely between adhering to a general policy which involves little more than departmental routine and permitting the Government to incur procedural penalties which may result in a judgment against it, a consequence to which Congress has given the Government's consent."

Because of respondents' refusal to make disclosure in accordance with the orders of Court, the Trial Judge entered an order directing that the Government be precluded from opposing the libellants' claims that the injuries were due to the negligence of the respondent or the unseaworthiness of the vessel (R. 182a). In this state of the record, the decision could not have been appealed because of the lack of a final judgment against the respondent. Respond-

ent then moved the Court for an order entering judgment against itself which the Court granted (R. 183-184a). Respondent thereafter appealed from that order granting its own motion for judgment.

The Opinion of the Court of Appeals.

The Court of Appeals below reversed the Trial Court upon the sole ground that the substance of a statement need not be disclosed in answer to interrogatories filed under Admiralty Rule 31 or its counterpart Civil Rule 33, that such disclosure could be effected only under Admiralty Rule 32 or Civil Rule 34, upon a showing of good cause. The Court of Appeals therefore found it unnecessary to consider any of the other contentions raised in the Trial Court.

In reaching its conclusion the Court of Appeals reasoned that an interrogatory calling for a copy of a statement was in effect a request for disclosure of the substance of the statement, but, the Court went on to hold, such disclosure was tantamount to production of the statement itself and the same limitation of good cause must be imposed whether the party proceeds under one rule or the other. The Court made no distinction between statements obtained by trial counsel and those obtained by other persons.

B.

JURISDICTIONAL STATEMENT.

These are proceedings within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court, involving claims for damages and maintenance and cure under the maritime law as modified by the Jones Act, 46 U. S. C. A. 688 and brought pursuant to the provisions of the Suits in Admiralty Act, 46 U. S. C. A. 741 et seq.

The Trial Court entered an interlocutory decree adjudging the respondent liable to the libellants and ordering that a further hearing be held solely on the question

of the extent of the damages. Respondent appealed to the Court of Appeals pursuant to the provisions of 28 U. S. C. 1292 (3) which provides for appeals from interlocutory decrees which determine the rights and liabilities of the parties in admiralty cases. The cases were heard by the Court of Appeals below en banc pursuant to 28 U. S. C. 46 (c) which Court reversed the decision of the Trial Court. This petition seeks a review of the decision of the Court of Appeals.

The judgment of the Court of Appeals sought to be reviewed was entered on November 23, 1949. The time within which to file the present petition was extended by Mr. Justice Burton to and including the 5th day of April, 1950.

The jurisdiction of this Honorable Court is invoked under Title 28 United States Code, Section 1254, and under Article 3, Section 2 of the Constitution of the United States.

C.

QUESTIONS PRESENTED.

Where a party or his agent, *but not his lawyer,* obtains a written statement from a witness, is his adversary entitled to disclosure of the substance of that statement in answer to interrogatories filed under Admiralty Rule 31 or Civil Rule 33 of the Federal Rules of Civil Procedure, or is he required to proceed under Admiralty Rule 32, or Civil Rule 34 of the Federal Rules of Civil Procedure, by a petition showing good cause, to compel production of the original statement in order to obtain the information?

Reasons Relied on for the Allowance of the Writ.

First: The Court of Appeals has decided a federal question of extraordinary importance which will have a most substantial direct effect upon every lawsuit in the civil and admiralty courts. The issue involves the most important of the rules of discovery and the construction which

is to be adopted will determine whether the discovery provisions will truly accomplish the objective of the rules, or whether the way will be left open for a return to the practice of concealment and surprise evidence. The issue involved in these cases arises in practically every lawsuit in the Federal Courts in the course of pretrial discovery. The question has not heretofore been decided by this court, but, because of its extraordinary and widespread importance, a decision of this Court is urgently needed to settle the question for the guidance of all Federal Courts.

Second: Rule 33[1] of the Federal Rules of Civil Procedure is the basic discovery tool, without which the whole discovery procedure would lose its potency and fail of its objective. Interrogatories may be directed under that rule to any party, and the sole express limitations upon the scope of the interrogatories is that they be relevant and not privileged. The Supreme Court in *Hickman v. Taylor and Anderson, et al.*, 329 U. S. 495, further limited the scope of interrogatories and held that *copies* of statements obtained by the *lawyer* in the case need not be produced except under Civil Rule 34, upon a showing of good cause. The Supreme Court reached this conclusion in order to afford a limited protection to the lawyer's mental processes referred to as the lawyer's "work product". The plain inference to be drawn from the Supreme Court's reasoning is that copies of statements taken by anyone other than the lawyer must be disclosed without any showing of good cause because they do not contain the lawyer's mental processes and "work product". In this case, the learned Court of Ap-

1. The Court of Appeals below pointed out that Civil Rule 33 and Admiralty Rule 31 are similar, and must be accorded the same construction and that the same is true with respect to Civil Rule 34 and Admiralty Rule 32. Accordingly, wherever hereafter Civil Rule 33 is referred to it is intended to include Admiralty Rule 31, and wherever Civil Rule 34 is mentioned it is intended to include Admiralty Rule 32.

peals below ruled that a party need not disclose the substance of a statement in answer to interrogatories under Civil Rule 33, regardless of whether it was taken by a lawyer or by anyone else, and that finding would appear to be in direct conflict with the reasoning of this Court in the Hickman case. The whole basis for the Hickman decision rested upon the need of a limited protection for the lawyer in developing his theories and strategies, and the Court held, since a copy of the statement might evidence these subjective elements, such a copy need not be produced without a showing of good cause. It follows that where the statement is not taken by the trial lawyer, the reason for the limited protection disappears and the information contained in the statement is "fair game" for an interrogatory under Rule 33. The Court of Appeals below clearly erred in rejecting this distinction under a mistaken interpretation of the rationale of the Hickman opinion.

Third: The Court of Appeals below erred in that it considered Civil Rule 34 a limitation upon Rule 33, when in fact, it should have considered it as a supplementary aid to Rule 33. Under the literal and plain language of Civil Rule 33, a party may compel his adversary to disclose everything he knows or has learned from witnesses, and, objections that the information is hearsay, inadmissible, incompetent or immaterial have been held insufficient in discovery proceedings. *Lewis v. United Airlines Transport Corp.*, 27 Fed. Supp. 946; *Houghton Mifflin Co. v. Stackpole*, 1 F. R. D. 506; *Pirnie v. Andrews*, 1 F. R. D. 253; *Byers Theatres v. Murphy*, 1 F. R. D. 286; *Brewster v. Technicolor, Inc.*, 2 F. R. D. 186; *DeSeversky v. Republic Av. Corp.*, 2 F. R. D. 183. Thus, a party may require his adversary to state verbatim the information obtained from a witness and this is precisely the same as requesting a copy of the statement of that witness. The Court of Appeals below erroneously reasoned that the disclosure of the substance of a statement effected the same result as the production of a document under Rule 34, and, that there-

fore, the limitation of good cause applicable to production of a document should apply to disclosure of the substance of the document. In so holding, the Court very substantially narrowed the scope of Rule 33 because, in any case where a party is interrogated in connection with any information or facts, which are contained in writing, that party could refuse to answer upon the ground that the request in effect involved disclosure of a document, which can only be accomplished under Rule 34 after a showing of good cause. The Court thus, limited the scope of Rule 33, not because that Rule was insufficient to compel disclosure of the substance of a statement but because the result so achieved is tantamount to that which can be accomplished by production of the document under Rule 34. This result is in conflict with the original intention of Rule 34 which was to supplement Rule 33 and not to impair its scope or operation in any way.

Fourth: The decision of the Court of Appeals below is inconsistent with the applicable legal principle which the Court itself recognized. The Court below conceded that a party must disclose all information in his possession in answer to interrogatories but held that, notwithstanding that rule, a party may not be required to disclose the substance of a statement or give a résumé of it. That the latter conclusion is inconsistent with the premise is apparent, and, moreover, it is in direct conflict with the plain and literal language of Rule 33. If this holding of the Court means that a party may edit and paraphrase the information contained in a statement and then scramble it so that its source and literal character may not be ascertained, then it would open the door wide to dishonest and incomplete answers to interrogatories. Moreover, if the substance of a statement may not be required, theoretically, that too would in effect result in a disclosure of the statement itself. To follow the Court's reasoning to its logical conclusion, in any case where information is contained in a writing it could not be subject to disclosure because it

would be tantamount to production of the document and good cause would first have to be shown. Such a result is in direct conflict with the Hickman opinion where this Court expressly held that all information must be disclosed in answer to interrogatories filed under Rule 33, and this includes even the information "gleaned" by the trial lawyer. The only qualification to this rule is, that, where the statement is obtained by the lawyer, a copy of it may not be required in order to protect the lawyer's theories. The information elicited however, enjoys no such immunity.

Fifth: Civil Rule 33 is the basic instrument, around which all the other discovery rules are constructed. This rule was intended to develop all the available information including the names and addresses of witnesses and the identity of documents. Armed with this information, a party is then in position to call the witnesses and intelligently examine them regarding the information within their knowledge. Should the witness give testimony different from that contained in the statement, the party is then in position to allege good cause for the production of the original statement in order to impeach the witness. Without the knowledge of the information contained in the statement the party would never know that the witness had departed from his prior statement and he could not demonstrate the necessary good cause. Thus, the decision of the Court below has the effect of not only impairing the usefulness of Rule 33, but also of rendering Rule 34 ineffective because the ncessary good cause can generally only be determined from the information obtained under Rule 33. Moreover, Rules 26 and 33 are expressly given the same scope. If Rule 33 is not competent to develop information because it is contained in a document then the same must be true of Rule 26. The paradoxical result from the decision of the Court below is, that, the information cannot be obtained under Rule 33 because it is contained in a document, and the document cannot be obtained under Rule 34 because the information necessary

to show good cause is not available. The decision of the Court below will completely frustrate the entire discovery practice and it is in direct conflict with the express liberal purposes attributed to the rules.

Sixth: The effect of the decision of the Court below is to read a requirement of good cause into Rule 33 despite the fact that the Supreme Court refused to approve such a proposed amendment when the Rules were revised as of March 19, 1948.

The issue presented in this action is not limited to the particular type of case involved herein but will have a direct and most substantial bearing upon every type of suit filed in the federal courts both in admiralty and on the civil side of the court. In practically every case the cause of action and the defense are based substantially upon information furnished by various sources and is committed to writing and stored in the files of the parties or their attorneys. The decision of the Court below would stalemate discovery of those facts because under the rationale of that decision, the disclosure of those facts would be tantamount to production of the document and the lack of information would frustrate production of the documents. The inevitable result must be a breakdown of the discovery procedure and a return to the "sporting theory of justice".

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Third Circuit, commanding that court to certify and send to this court for review and determination on a day certain, to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 9806 and 10,019, Nathan R. Alltmont and Charles O'Neill v. United States of America, United States Maritime Commission, and that the decree of the United States Court of Appeals for the Third Circuit in this case may be reversed by this Honorable Court.

and that your petitioners may have such other and further relief in the premises as may be just.

And your petitioners will every pray.

NATHAN R. ALLTMONT,
CHARLES O'NEILL,
By ABRAHAM E. FREEDMAN,
Counsel for Petitioners.

I hereby certify that I have examined the foregoing petition, and that in my opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

ABRAHAM E. FREEDMAN,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court was rendered on August 23, 1948, and is reported in 79 Fed. Supp. 827. On June 3, 1949, the Court of Appeals for the Third Circuit rendered a Per Curiam Opinion which is not reported but which is set forth in the record certified to this Court (R. 191a). The District Court then entered a clarifying opinion on June 27, 1949, which is reported in 87 Fed. Supp. 214. The Court of Appeals thereafter rendered its opinion on the merits of the controversy on November 23, 1949, which is reported in 177 F. (2d) 971. On February 3, 1949, the Court of Appeals entered an order amending its opinion which is not reported but which is appended to the record certified to this Court.

II.

JURISDICTION.

These are actions by American Merchant seamen to recover damages and maintenance and cure for injuries received while in the service of a vessel owned by and operated on behalf of the United States. Judgment was entered against the respondent in the Trial Court because of the refusal of the respondent to disclose the substance of the statements of witnesses in answer to interrogatories. That judgment was reversed by the Court of Appeals below upon the ground that a party need not disclose the substance of a statement in answer to an interrogatory. This ruling of the Court below involves the interpretation of the main discovery rules both under the admiralty system and under the Federal Rules of Civil Procedure, which

were promulgated by this Court. The decision of the Court below involves an important federal question relating to the practice in the Federal courts both on the admiralty and civil sides.

These proceedings are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. The jurisdiction of this Honorable Court is invoked under Title 28 United States Code Section 1254.

III.
STATEMENT OF THE CASE.

Inasmuch as a statement of the case has necessarily been set forth in the Petition, a restatement here is omitted in the interest of brevity.

IV.
SPECIFICATION OF ERRORS.

The Court of Appeals erred in the following respects:

First: In holding that there is no distinction between statements of witnesses secured by a party's *trial counsel* in preparation for trial and those obtained by others for the use of the party's trial counsel.

Second: In holding that the rationale of the opinion of the Supreme Court in the *Hickman* case requires the same showing of good cause for the disclosure of the substance of a statement as it does for the production of the original document, regardless of whether the statement was obtained by trial counsel.

Third: In holding that a party is not required to disclose the substance of a statement in answer to interrogatories under Rule 33 without a showing of good cause, thus reading into that rule a requirement of good cause which was never intended.

Fourth: In reading the requirement of good cause into Rule 33, the Court of Appeals below extended that limita-

tion from Rule 34, where it is expressly provided for, to Rule 33 which does not contain any such requirement either expressly or by inference.

Fifth: In holding, inconsistently, that while a party is required to disclose all the information in his possession in answer to interrogatories, he may not, however, be required to disclose the substance or résumé of a statement in his possession in answer to interrogatories without any showing of good cause.

Sixth: The decision of the Court below will preclude a party from obtaining the information contained in any writing under Rule 33, and, that fact will effectively prevent a showing of good cause, as will be necessary under the decision of the Court below, to compel disclosure of the substance of the statement or the original statement itself under Rule 34.

V.
ARGUMENT.

(a) Summary of Argument.

Petitioners were injured in the course of their employment under circumstances over which they had no control. All the facts relating to the cause of the explosion are in the possession of the respondent, in the form of written statements obtained by respondent's investigators who were not the lawyers in the case. Petitioners sought to elicit the substance contained in those statements by asking for copies, in answer to interrogatories. The Court of Appeals below held that disclosure of the substance of the statements was tantamount to production of the documents themselves and that such disclosure could not therefore be required without a showing of good cause. Petitioners contend that Rule 33 is sufficiently broad in scope to require disclosure of any and all information within the knowledge or possession of a party or his agents and this includes hearsay evidence and any other information having any bearing on the case or which might lead to any pertinent data. A party may compel his adversary to disclose that which he learned from any witness and the fact that such information was committed to writing does not give it any privileged status. The Court of Appeals conceded that the demand for a copy of a statement is not a demand for the production of a document but rather calls for the disclosure of the *substance* of the statement. Petitioners contend that, as such, it clearly falls within the scope of Rule 33, under which a party may be required to disclose all the hearsay which has come to his knowledge. The Court of Appeals recognized this fact but fell into error by holding that, since the disclosure of the substance of a statement effected the same result as the production of the original statement itself, then the same limitation of good cause necessary for the production of the statement must apply to disclosure of the substance of that

statement. The Court below thus read into Rule 33 a requirement of good cause which was never intended and construed the Rules in a fashion tending to limit the scope of discovery rather than in a most liberal manner in order to give effect to the express purposes of the Rules. While all the rules must be read together, they should not be so construed as to limit each other but rather, to supplement each other and make most effective all the discovery tools. The Court of Appeals should have decided the question here by determining whether the disclosure of the substance of a statement fell within the scope of Rule 33 without regard to the limitation imposed on the right to production of the document itself. Rule 34 was intended to supplement Rule 33 and fill in any gaps which could not be reached by the latter Rule. Rule 33 was intended to compel disclosure of all information wherever it be located, and each party is entitled to this information as a matter of unqualified right. Rule 34 was intended to compel production and examination of physical objects such as machines, buildings, land, documents, and other personal and real property. In connection with documents, while the information contained therein is subject to disclosure under Rule 33, the original document may be needed under Rule 34 for purposes of impeachment, to check handwriting, to look for alterations or other matters which can be determined only from an examination of the original document.

The decision of the Court of Appeals below will necessarily cause a most substantial impairment in the operation of all the discovery rules. In any case where information is committed to writing a party may elude discovery under Rules 26 and 34 by stating that the application should be made under Rule 34 for production of the document. An application under Rule 34 can then be frustrated, because, lack of knowledge of the information contained in the document precludes a showing of good cause which is essential under Rule 34.

The unsoundness of the decision of the Court below would seem to have stemmed from an erroneous interpretation of the opinion of this Court in the *Hickman* case. The rationale of the *Hickman* case, said the Court below, applies to all statements regardless of whether they were obtained by trial counsel or a lay person. This holding completely overlooks the whole basis for the *Hickman* decision. In that case the Supreme Court was dealing with a statement taken by a lawyer. If the Supreme Court had shared the view expressed by the Court below, it would have been a very simple matter to have denied the request for disclosure of the substance of the statement upon the ground that the application should have been made under Rule 34 with a showing of good cause. The Supreme Court however, found it necessary to make the very distinction which the Court below rejected, namely, that where the statement is taken by the trial lawyer it is permeated with the lawyer's theories and mental processes, and because of this fact, a copy of a statement taken by the trial lawyer, as distinguished from one taken by any other person, is entitled to a limited protection, solely for the purpose of protecting the trial lawyer's theories which may be manifest from a verbatim copy of the statement. The protection is accorded only to the lawyer's theories and not to the facts developed. This Court stated that neither the lawyer nor his client have any proprietary interest in the facts regardless of who discovered them. The implication is clear, that, where the lawyer's theories and mental impressions are not involved, the limited protection falls away and there is no limitation to disclosure of copies of statements under Rule 33. The Court of Appeals below completely overlooked this point which was so crucial in the decision of the *Hickman* case. Petitioners accordingly make the following contention:

> A party is entitled to disclosure of all relevant and non-privileged information in the possession of any other party in answer to interrogatories filed un-

der Rule 33, and this includes the disclosure of the substance of any statement except where such statement is obtained by trial counsel.

(b) The Objective of the Discovery Rules.

Before the adoption of the Federal Rules of Civil Procedure each party to a litigation entered into the trial of the case without being aware of the information and data in the knowledge and possession of the other. It was the custom and practice for the parties to keep each other in the dark as much as possible and the trial developed into a battle of wits between the lawyers, not simply on the application of legal theories and inferences, but in attempting to keep relevant evidence out of the case which might be unfavorable to one or the other. The inevitable result was that because of the lack of proof which was concealed in the adversaries' file, many meritorious claims were lost, and many cases were won which may have been denied if all the facts were brought to light. The discovery provisions of the Federal rules were specifically designed to correct this inequitable situation and prevent such miscarriages of justice.

The trial of a lawsuit will always be an adversary proceeding and as such will entail a battle of wits between respective counsel, but that battle must be in the application of the law and the working out of legal and factual inferences from a complete set of facts equally available to both sides. This was the objective of the new Federal rules. In *Mackerer v. New York Central R. R. Co.*, 1 F. R. D. 408, the Court, quoting with approval from an article by Justice Holtzoff, said:

> "The purpose of the new procedure has been to throw into discard the technicalities that acted as a brake on the progress of a lawsuit; to abolish what has been so aptly termed as 'the sporting theory of justice,' to provide efficient machinery for the ascer-

tainment of truth; and to expedite a determination of each controversy on the merits."

Nor is this objective to be sidetracked by collateral considerations as the Court of Appeals for the Second Circuit pointed out in *Hoffman v. Palmer*, 129 F. (2d) 976, as follows:

> "Some lawyers also grumble, saying that it is 'unfair' that a lawyer who has diligently prepared his case should be obliged to let counsel for the adversary scrutinize his data. But the reformers are surely right in replying that 'unfairness' to a diligent lawyer is of no importance as against much-needed improvement in judicial ascertainment of the 'facts' of cases; *the public interest in such ascertainment is paramount.*" (Emphasis supplied.)

In sum, the purpose of the discovery provisions in the rules was to afford to all parties to a litigation an equal opportunity to examine and appraise all the facts in the case regardless of who discovered them or where they were located, to the end that a just result would be achieved. Bearing in mind this objective of the rules, it is appropriate to examine the tools which were designed to effect that purpose.

(c) The Tools of Discovery.

There are two discovery rules under the admiralty practice as compared to three such provisions under the Federal Rules of Civil Procedure.[2] Admiralty Rule 31 and Civil Rule 33 are directed to the disclosure of information, while Admiralty Rule 32 and Civil Rule 34 are directed to the production of physical objects and the entry

[2] The text of Admiralty Rules 31 and 32, and Civil Rules 26, 33 and 34 are hereinafter set forth in an appendix to this brief. The Civil Rules were amended as of March 19, 1948, and, the text as hereinafter set forth indicates the language deleted from the old rule, and the new provisions amending the rules are in italics.

upon and examination of land or other property. These four rules are limited in their application to parties to the litigation. Civil Rule 26 is directed against any person whether or not a party, and it provides for interrogation of any such person by oral or written interrogatory. It also defines the scope of the examination of such persons and that definition has been expressly incorporated by reference into Civil Rules 33 and 34, and by judicial interpretation into Admiralty Rules 31 and 32.

All three of the Civil Rules were amended as of March 19, 1948, but these changes did no more than put into express language the construction which had already been placed upon them, insofar as they bear on the issues in this case. The amendment to Rule 26 (b) eliminated objections based on the ground that the information sought would be inadmissible at the trial (such as hearsay), but the rule in its original form had already been so construed. *Houghton Mifflin Co. v. Stackpole,* 1 F. R. D. 506; *Pirnie v. Andrews,* 1 F. R. D. 253; *Byers Theatres v. Murphy,* 1 F. R. D. 286. The amendments to Rules 33 and 34 provided that they should have the same scope as Rule 26 (b) but this also was merely a restatement of an already existing construction. *Nichols v. Sanborn Co.,* 24 F. Supp. 908; *Heublein v. Bushmill,* 2 F. R. D. 190.

Admiralty Rules 31 and 32, being worded the same as their counterparts in the Civil Rules were accorded the same construction as was applicable to the Civil Rules, before the amendments, *The American Tobacco Co. et al. v. Goulandris et al.,* 1946 A. M. C. 303; *The Raphael Semmes,* 1942 A. M. C. 1402; *Great Atlantic & Pacific Tea Co. v. The Velox,* 36 F. Supp. 236, as well as after the amendments, *Standard Marine Insurance Co., Inc. v. American Export Lines, Inc.,* 1950 A. M. C. 326 (Jan. 17, 1950). Accordingly, whatever is said about Civil Rules 33 and 34 applies with equal force to Admiralty Rules 31 and 32.

While each of the discovery rules serves a separate and independent function, Rule 33 is, however, the fulcrum which enables the other rules to operate most successfully.

It is this rule which is used to expose all the facts in the possession of every party and the identity of the sources of that information. Armed with this information, the parties may then call the witnesses and intelligently examine them upon the information already disclosed or explore new avenues related to the proof of or defense against the alleged cause of action. Where the witness departs from the substance of a statement previously given the way is then open to allege good cause and require production of the signed statement under Rule 34 for purposes of impeachment. Or Rule 34 may be used to compel production in order to check the handwriting or for alterations in the statement. The latter rule may also be used to examine a photograph, a machine, a parcel of land, a building, or any other physical object which is referred to or identified in the information elicited under Rule 33.

It is thus apparent that Rule 33 is the foundation stone of the entire discovery practice since it not only develops all the pertinent information in the possession of every party but it is essential for the intelligent and effective use of the other two rules. Without the disclosure of the facts under Rule 33, the oral examination of a witness under Rule 26 would leave much material information undiscovered; and without that same information it is virtually impossible to show the good cause which is necessary for the production of a document under Rule 34.

(d) The Scope and Limitations of Civil Rule 33.

As originally promulgated, Civil Rule 33 was all inclusive and contained no express limitations. From the very outset, however, it was construed to cover the same ground and was subject to same limitations contained in Rule 26. The examination under the latter rule permitted the widest latitude and the only limitations imposed were that the subject matter be relevant and not privileged. Rule 33 was designed not only for the discovery of those facts which would be admissible at the trial, but it was

also intended to expose all that information which might lead to the disclosure of relevant evidence at the trial. The scope of this rule was very well summarized by Justice Holtzoff in 41 Mich. Law Review, 205, as follows:

> "From the very inception, the principle was enunciated by the Courts that the scope of examination on interrogatories is co-extensive with that permitted under the rules relating to depositions. *Specifically, interrogatories need not be confined to securing evidence that would be admissible at the trial, but may include inquiries for the purpose of eliciting information leading to the procurement of such evidence.* They need not be limited to ultimate facts, but may extend to detailed items of evidence. *That the proceeding may constitute a 'fishing expedition' is not a valid objection to interrogatories.* As a matter of fairness, if there appears to be a reasonable probability or even possibility that there may be fish in the pond, there is no reason why the litigant should not be permitted to endeavor to catch them. *A liberal attitude on this point will promote the ends of justice.*" (Emphasis supplied.)

With respect to the limitation imposed by the Rule, Justice Holtzoff goes on to say:

> "The elimination of the 'sporting theory' of justice, the simplification of procedure, and the prompt disposition of controversies on their merits are the great objectives of the new federal civil practice. One of the principal means for the attainment of these purposes is discovery, by which a disclosure may be obtained in respect to all pertinent information in the possession of any party to a litigation. An exception is, of course made for privileged matter. *It is one of the basic theories of the new procedure that every party to a law suit is under a duty to reveal to any other all pertinent data in his control, with the sole*

> *exception just mentioned.* Broad and liberal discovery is one of the outstanding contributions to civil procedure made by the new federal rules." (Emphasis supplied.)

To the same effect are *Nichols v. Sanborn Co.*, 24 F. Supp. 908; *Heublein v. Bushmill*, 2 F. R. D. 190; *American etc. Corp. v. American Oil Co.*, 25 F. Supp. 386; *Loughran v. Zimmelman*, 28 F. Supp. 348; *Brewster v. Technicolor, Inc.*, 2 F. R. D. 186; *Schoeneman v. Brauer*, 1 F. R. D. 292; *American Lecithin Co. v. Cleary Corp.*, 1 F. R. D. 603; *Pirnie v. Andrews*, 1 F. R. D. 253; *DeSeversky v. Republic Air Corp.*, 2 F. R. D. 183.

The discovery provisions of the rules are designed to seek out the truth and achieve substantial justice. All other considerations must be subordinated to that purpose as the Court said in *Seligson v. Camp Westover, Inc.*, 1 F. R. D. 733, as follows:

> "To the extent that this search for the truth infringes on the convenience of litigants, such convenience must yield to that extent."

It is thus clear that, subject only to the limitations of relevancy and privilege, Rule 33 is designed to enable the parties to make the most penetrating search into each other's files, to the end that all the facts will be before the Court and a just result achieved under the law.

(e) Rule 33 Contemplates Disclosure of the Substance or Copy of a Statement.

It has already been demonstrated that Rule 33 is sufficiently broad as to require disclosure of all information in the hands of any party, and this disclosure extends beyond the evidentiary facts which are admissible in evidence. A distinction must be made in this connection between "discovery facts" and "evidentiary facts." The evidentiary facts which are admissible in evidence are the operative facts, upon the basis of which the ultimate is-

sue will be decided. Those facts are generally neither identified nor available at the outset of any litigation. It is essential in the preparation of any case to run down every bit of information in order to reach all relevant data, and thereafter comb out the inadmissible material from the operative facts. In the preliminary search, all material having any bearing on the litigation must be assembled and this includes rumors, hearsay and other inadmissible matter. A person may not have any personal knowledge relating to the litigation but he may have heard of such information from another individual. The information so obtained is obviously inadmissible in evidence, but it is nevertheless extremely important because it brings to light the factual material in the case. It is that information which may be termed the "discovery facts," and it is not open to dispute that such information is clearly within the scope of Rule 33.

An interrogatory may be directed to a party directing him to set forth all the information which he knows of his own personal knowledge and that which he has ascertained from others. In connection with the latter, the party, in answering the interrogatories, may not paraphrase or edit that information so as to present the version which that party believes to be true. The interrogatories contemplate information in the form received by the party and not an edited version of it. For example, assume that a party, in the course of an investigation, obtained statements from two witnesses, one stating that at the time of a particular incident the scene was *dark*, while the other stated that it was *light*. In answering an interrogtaory as to the condition of light, the party may not limit his answer to the one which he believes to be true, but he must furnish the information supplied by both witnesses in precisely the form in which he received it. The party is not prejudiced by the disclosure of inconsistent statements or of information which is unfavorable to him, because he does not vouch for its veracity nor is he bound by it in any way.

In the search for "discovery facts," a party may inquire by interrogatory of the adversary for the precise information furnished by any witness. Where the information has been furnished orally, the adversary may avoid answering in whole or in part upon the ground that there has been a failure of recollection. Where, however, the information has been reduced to writing, there is no escape from complete disclosure, because the adversary need only refer to the writing in order to answer the interrogatory fully and accurately. The adversary in this situation is simply relating hearsay, in answering the interrogatory, and this factor poses no obstacle in the search for "discovery facts." It is quite clear, therefore, that a party may be required to disclose the substance of a statement in answer to an interrogatory under Rule 33, since such a request actually relates to the disclosure of information and not to the production of a document. It follows from this that a request for a copy of a statement must likewise be disclosed in answer to an interrogatory under Rule 33 because a copy of a document actually involves the disclosure of the substance of the statement and not the production of the document itself. This precise point was met squarely in *DeBruce v. Pennsylvania R. R. Co.*, 6 F. R. D. 403, where the Court reasoned as follows:

> "It is to be noted that the problem presented is not entirely one of production of a document. Although the plaintiff has asked for a paper which, I suppose, answers to the description of 'a document', the same problem would have been presented had he asked the defendant to disclose the substance of what a witness or witnesses told its claim agent. The nature of the disclosure in question may be illustrated by supposing a case in which the defendant's entire knowledge of what occurred had been derived from a single eye-witness, who had given a written statement, and the interrogatories, in substance, called for a full statement of the facts of the accident as known to the

defendant. Any careful, honest lawyer preparing answers to those interrogatories for his client would perforce include in them the substance of what was in the witness's statement, no more and no less and, in fact, *he could do no better than give the statement word for word.* Nor can there be any doubt that he could be required to give the name of the witness from whom his client obtained its knowledge. *Thus it can be seen that what is really asked for is a disclosure of facts and an identification of the source from which they have been obtained; and to deal with the question as though it involved merely a request for the inspection of an original document seems to me a misleading formalism.*

The Court of Appeals below conceded that a request for a copy of a statement was the same as one calling for disclosure of the substance of the statement, but, the Court below went on to hold that, under the rationale of the opinion of the Supreme Court in the *Hickman* case, a party is not required to disclose the substance of any statement, without a showing of good cause; and that this was so regardless of whether or not it was obtained by trial counsel. This holding of the Court of Appeals below completely misapprehends this Court's reasoning in the *Hickman* case and the sole basis for the decision. The basic question involved in the *Hickman* case was whether or not a copy of a statement taken by a lawyer was entitled to any different or greater protection than that afforded to a copy of a statement obtained by one who was not trial counsel. This Court ruled in the *Hickman* case that, because the statement which was obtained by the lawyer in the case would manifest the lawyer's theories, and, since public policy required some protection for this subjective element in the statement, it need not be disclosed without a showing of good cause. The protection thus afforded extended only to the trial lawyer's theories and it was this fact which impelled the Court to make a distinction between copies of

statements obtained by trial counsel and those secured by others. This point is covered in an excellent review of the *Hickman* opinion in 62 Harvard Law Review 269, as follows:

> "The arguments for nondisclosure which moved the Court to establish a qualified privilege for attorneys in the *Hickman* case do not support an extension of that privilege to train crew reports and statements taken by claim agents. That part of the majority opinion which pointed out that an attorney would be reluctant to make full investigation if the facts he unearthed could be used against his clients might be urged against discovery here. But it is doubtful that any such fear would really influence the functions of claim investigators. Their work and the report of the train crew are essential to internal administration of the railroad. Potential use in defense against a claim is only a part of their function. Nor is the fact that these reports are taken on the advice of railroad attorneys sufficient to bring them within the rule of the *Hickman* case. *None of the workings of the trained trial counsel's mind will affect the shaping of these reports. It is this subjective element which the court sought to protect in the Hickman decision.*"

It is apparent that the Court of Appeals below was clearly in error in holding that the rationale of the *Hickman* case protects a party from having to disclose a copy of any statement, regardless of whether it was obtained by the attorney in the case or by someone else. It is submitted that the rationale of that opinion is exactly to the contrary and the decision in the case was based on the very distinction which was rejected by the Court below. The Supreme Court in the *Hickman* opinion repeatedly pointed out that its decision was based upon the fact that the statements were obtained from the witnesses by *trial counsel,* as the Court in *DeBruce v. Pennsylvania R. R. Co., supra,* stated after a review of that opinion as follows:

"I do not think that the defendant's contention as to the scope and effect of the opinion in Hickman v. Taylor can be sustained. A careful reading of it indicates that the Court at no point intended to deal with anything beyond the specific problem before it—a problem which it stated so plainly as to admit of little question. The first sentence of the opinion is 'This case presents an important problem under the Federal Rules of Civil Procedure * * * as to the extent to which a party may inquire into oral and written statements of witnesses, or other information, *secured by an adverse party's counsel* in the course of preparation for possible litigation after a claim has arisen,' and later on the Court says 'And the basic question at stake is whether any of those devices may be used to inquire into materials *collected by an adverse party's counsel* in the course of preparation for possible litigation.' Throughout the opinion at every point at which occasion arose the Court explicitly stated that what was under review was discovery procedure directed to the disclosure of statement obtained by an *attorney* for his client in preparation for trial. . . ."

These factors completely refute the interpretation of the Court of Appeals below regarding the rationale of the *Hickman* opinion. Parenthetically, if the interpretation of the Court below were correct, for what reason would the Supreme Court in the *Hickman* case have gone to such lengths in protecting the lawyer's "work product," if all it had to do was to declare that the substance or copy of a statement is not subject to disclosure without a showing of good cause. If the Court had intended such a result it would not have made the slightest difference who obtained the statement because the reason for the rule would have been the fact that the statement had been committed to writing. The opinion of the Court does not permit of any such inference. Such an inference is refuted by the

very fact that the Court did draw a sharp distinction between statements taken by attorneys and those obtained by others, and it was to protect the lawyer's privacy in his preparation for trial that such a distinction was made. It would appear that the Court of Appeals fell into error by overlooking this significant distinction.

The issue under consideration here was the subject of a comprehensive review by the editors of the Federal Rules Service, who, after a painstaking analysis of the arguments on both sides of the question reached a conclusion contrary to that of the Court of Appeals below, as follows (Commentary in Federal Rules Service Vol. 10, p. 1041):

> "On the merits, which is the correct procedure? The question is not merely one of which rule to designate in the moving papers. As indicated above, no extrinsic showing of good cause is required where the procedure is under Rule 33, whereas such a showing is explicitly required by Rule 34. Judge Kirkpatrick expressly holds that no such showing need be made where *copies* of statements are sought, as long as they were not prepared by an attorney. The Supreme Court decision of course requires a showing of good cause in the latter case, but there is nothing in the opinion one way or the other on the need for such a showing where the statements were not taken by a lawyer. The proposed amendment to Rule 30b drafted by the Advisory Committee would have protected 'any writing obtained or prepared by the *adverse party*, his attorney, surety, indemnitor, or *agent* in anticipation of litigation or in preparation for trial' unless a showing was made that denial of production or inspection would unfairly prejudice the party seeking production or cause him undue hardship or injustice. The amendment was rejected by the Court, however, and *as the Rules stand the burden is not on the party seeking discovery to show why he should have it—except under Rule 34—but is on the other party to*

show why discovery should not be allowed. In fact, the Court has adopted an amendment to Rule 45, dispensing with the necessity for a court order for issuance of a subpoena duces tecum on the taking of a deposition. Since the discoverer, under this amendment, will ordinarily be able to obtain production of statements without any initial showing of 'good cause', it would seem that he should be able to achieve the same result by the more expeditious and inexpensive method of interrogatories. The opposing party can always resist the motion on the ground that it is oppressive. *If the discoverer for some reason wants to see the original statements, he can proceed under Rule 34, but he should not be required to do so where he wants only copies."* (Emphasis ours.)

The Court of Appeals below stated that the decisions from other courts preponderated in favor of the view which it adopted, but an examination of those cases discloses that in most instances the issue was not squarely raised or met and in not one of those cases is there a comprehensive analysis of the question. It is significant to note that in every case where a careful study of the question was made the conclusion was reached which is opposed to that of the Court of Appeals below, and this includes the article in Harvard Law Review, *supra,* the commentary by Pike and Willis, *supra,* and the decisions of different courts. *De-Bruce v. Pennsylvania R. R. Co.,* 6 F. R. D. 403 (E. D. Pa.); *Dugger v. Baltimore and Ohio R. R.,* 5 F. R. D. 334 (E. D. N. Y.); *Standard Marine Ins. Co. v. American Export Lines, Inc.,* 1950 A. M. C. 326 (S. D. N. Y., Jan. 17, 1950); *Hayman v. Pullman Co., et al.,* 8 F. R. D. 238 (N. D. Ohio).

In *Standard Marine Ins. Co. v. American Export Lines, supra,* the litigation involved a claim for cargo damage and the suit was in admiralty, as here. The operator of the vessel served interrogatories requiring the adversary to furnish information concerning correspondence, the insurance contract and information contained in other

documents, and in addition required the party to "annex to your answer to these interrogatories copies of said correspondence." Objection was made that the interrogatories "exceeded the proper scope of interrogatories," but the Court overruled the objections and sustained the interrogatory in its entirety.

In *Hayman v. Pullman Co. et al., supra,* the Court met and disposed of the issue involved in this case, as follows:

> "The final objection to the effect that the plaintiff should resort to a motion under Rule 34 to obtain the desired information rather than to have it divulged under Rule 33, if sustained, would circument the very aim and purpose of the rule. Admittedly plaintiff could first ask in the interrogatory whether the statements requested are in defendant's possession and then proceed to file a motion to produce them. That method, however, would only serve to delay the ultimate result.
>
> "We have sought for decades to simplify court procedure. We have tried to eliminate the sparring match aspects of lawsuits. We have sought to minimize needless technicalities. Now that the tools are provided therefore in the simplified rules of procedure we must not retrogress.
>
> "Objection to interrogatory overruled."

These are the sentiments which truly reflect the spirit and purpose of the discovery provisions of the rules. On the other hand, the decision of the Court below, if allowed to stand will result in a most incongruous situation. When reduced to its logical conclusion, it means that in any case where facts or information are reduced to writing the substance of that writing need not be disclosed without a showing of good cause, and good cause cannot generally be shown unless the substance of the statement is first ascertained. This result is indicated in the *DeBruce* opinion where the Court stated, as follows:

"The Supreme Court clearly recognized that these objectives involve more than disclosure of bare facts. The Court said: 'Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. • • • Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning.'

"In the light of the excerpt from the opinion of the Supreme Court quoted above, another illustration may be given which may help to emphasize the point. Suppose a case in which there were two eyewitnesses to an accident and their statements, taken by the defendant, were in direct conflict, one disclosing facts which make the defendant liable and the other facts which entirely absolve it. Were the inquiry to be limited to bare facts, the defendant (assuming that it believed that the first mentioned was the true version) could honestly state those facts and no others. *How could the plaintiff then show 'good cause' under Rule 34 for obtaining the version of a witness whose account he had no reason to believe and could not aver was in any way different from the facts as set forth in the defendant's answers.* The same considerations would apply if a witness, having given a statement to the defendant, later repudiated it." (Emphasis supplied.)

Judge Kirkpatrick, in the *DeBruce* case, where the issue was identical with the controversy at bar, then draws on the *Hickman* opinion in support of full disclosure in answer to interrogatories, as follows:

"The Supreme Court said 'Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, *either party*

may compel the other to disgorge whatever facts he had in his possession,' and it seems obvious that the Court did not intend to emasculate the Rule by making the questioned party the sole judge of what the relevant facts are, but meant that he should disclose all the information which he had received and designate the sources from which he had received it.'' (Emphasis ours.)

VI. Conclusion.

The introduction of the discovery rules into the federal practice which were designed to eliminate the so-called "sporting theory of justice," was hailed as one of the greatest advances in American jurisprudence, and in actual practice that objective has been very largely achieved. The decision of the Court of Appeals below, if allowed to stand, will completely emasculate the rules and open the door to the same undesirable practices which the rules were intended to wipe out.

The effective operation of the entire discovery practice depends upon a broad and liberal interpretation of Rule 33. It is that rule which is used to develop the information for the intelligent and successful use of Rule 26, and to show the good cause which is essential for production of any document under Rule 34. The decision below is in conflict with the plain language as well as with the rationale of Rule 33, and will frustrate in substantial measure the proper operation of all the rules. It is a serious step backward and a retreat from the laudatory objective of the discovery rules.

We earnestly submit that the question involved in this petition is of vital importance in connection with the practice in the federal courts, both in admiralty and on the civil side and merits a review by this Court, to the end that the judgment below may be ultimately reversed.

Respectfully submitted,

Abraham E. Freedman,
Attorney for Petitioners.

ADDENDUM.

Rule 26 (a) and (b) As Amended.

(a) When Depositions May Be Taken. ~~By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes.~~ *Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action.* The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether ~~relating~~ *it relates* to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books,

documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. *It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.*

Rule 33 As Amended.

Any party may serve upon any adverse party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, by any officer ~~thereof competent to testify in its behalf~~ *or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained.* The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the ~~delivery~~ *service* of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. ~~Objections to any interrogatories may be presented to the court within 10 days after services thereof, with notice as in case of a motion; and~~ *Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time.* Answers to *interrogatories to which objection is made* shall be deferred until the objections are determined, ~~which shall be at as early a time as is practicable. No one party may, without leave of court, serve more than one set of interrogatories to be answered by the same party.~~

Interrogatories may relate to any matters which can be inquired into under Rule 26 (b), and the answers may be used to the same extent as provided in Rule 26 (d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30 (b) are applicable for the protection of the party from whom anwers to interrogatories are sought under this rule.

Rule 34 As Amended.

Upon motion of any party showing good cause therefor and upon notice to all other parties, *and subject to the provisions of Rule* 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence ~~material to any matter involved in the action~~ relating to any of the matters within the scope of *the examination permitted by Rule 26 (b)* and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated ~~relevant~~ object or operation thereon *within the scope of the examination permitted by Rule 26 (b).* The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

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Department of Justice Order No. 3229 4

Federal Rules of Civil Procedure:

Rule 33 ..... 3, 10, 11

Rule 34 ..... 3, 10, 12

Alexander Holtzoff, *Instruments of Discovery under Federal Rules of Civil Procedure*, 41 Mich. L. Rev. 205 11

2 Moore's *Federal Practice*, § 34.04, p. 2639 11

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 734

NATHAN R. ALLTMONT AND CHARLES O'NEILL, PETITIONERS

v.

UNITED STATES OF AMERICA, UNITED STATES MARITIME COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania (R. 177) is reported at 79 F. Supp. 827. The *per curiam* opinion of the Court of Appeals for the Third Circuit, remanding the cause for clarification of the decree (R. 191) is not reported. The supplemental memorandum *sur decree* of the District Court (R. 194) is reported at 87 F. Supp. 214. The opinion of the Court of Appeals *in banc* (R. 208) is reported at 177 F. 2d 971. The order of the Court of Appeals amending its opinion is not reported (R. 223).

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JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1949 (R. 224). By orders of Mr. Justice Burton dated January 31, 1950 (R. 225), and March 15, 1950 (R. 226), the time for filing a petition for a writ of certiorari was extended to, and including, April 5, 1950. The petition for a writ of certiorari was filed on April 5, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether copies of statements of witnesses taken after suit is commenced and in preparation for trial may be obtained by interrogatories under Admiralty Rule 31 or only by discovery under Admiralty Rule 32 upon a showing of good cause.

2. Whether copies of statements of witnesses taken at the direction of Government counsel by agents of the Federal Bureau of Investigation after suit is commenced are the work product of counsel within the doctrine of *Hickman* v. *Taylor*, 329 U. S. 495.

RULES OF PROCEDURE INVOLVED

Admiralty Rules 31 and 32 are set forth in the Appendix, *infra*, pp. 17–18.

STATEMENT

On November 19, 1945, the Government owned and operated tanker *Cedar Mills* was destroyed

by the explosion of a mine at Ancona, Italy, then a British-occupied port (R. 152, 167–170, 177). These proceedings brought by petitioners, members of the crew of the *Cedar Mills*, seek to recover damages and maintenance and cure for personal injuries allegedly sustained by them.

After the institution of suit, petitioners, proceeding under Admiralty Rule 31,[1] filed interrogatories (R. 12–13, 23–25) to which the United States filed exceptions. These exceptions were overruled, and thereafter the Government filed its answers to the questions propounded. These answers were, in the words of the District Judge, complete and a "* * * bona fide effort to make full disclosure * * *" with one exception (R. 177–178). The Government declined to comply with a portion of the interrogatories which would have required the production of copies of written statements of persons having knowledge of the accident, taken by the Federal Bureau of Investigation.[2] Two grounds were urged in sup-

[1] Admiralty Rules 31 and 32, prior to March 19, 1948, were identical with Rules 33 and 34 of the Federal Rules of Civil Procedure.

[2] Interrogatory No. 2 in the *O'Neill* case, which is identical with Interrogatory No. 3 in the *Alltmont* case, states (R. 12, 23):

"2. Attach hereto true and correct copies of all written statements (signed or unsigned) from any and all persons including the plaintiff who purport to be witnesses or have any knowledge regarding the said accident and/or injuries or any matter connected therewith or related thereto, includ-

port of this refusal to produce: (1) that such statements were the work product of the Department of Justice; and (2) that the statements were privileged under Department of Justice Order No. 3229 of May 2, 1939 (R. 177–178).

The information furnished or made available to petitioners comprised the following: (1) Report dated November 26, 1945, of an investigation begun on November 20, 1945, by War Shipping Administration representative Daily (R. 73–75); (2) Report dated November 26, 1945, of an investigation begun on November 22, 1945, by War Shiping Administration representative Wanat (R. 82–87); (3) Statements of the Master, Chief Mate, Third Officer, 1st Asst. Engineer, and Purser of the *Cedar Mills* given under oath at Leghorn, Italy, on November 26, 1945, during an investigation by the United States Coast Guard (R. 30–73); (4) Findings of the Coast Guard Examining Officer (R. 162); (5) Statement of the Master of the *Cedar Mills* to his home office dated January 29, 1946 (R. 80–82); (6) Statement of petitioner Alltmont, Chief Engineer of the *Cedar Mills,* dated April 2, 1946 (R. 76–80); (7) Copy of entries in the rough bridge log book (R. 19–20); (8) Copy of entries in the bridge bell

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ing statements taken by the Federal Bureau of Investigation. Attach hereto true copies of memoranda of any oral statements which the American Petroleum Transport Corporation or its representatives or the United States of America have obtained or received from any such person."

book (R. 21–22); (9) Official log book of the *Cedar Mills* (R. 162); (10) Routing instructions for leaving and entering Ancona (R. 172–174); (11) Admiralty Chart No. 3212 issued by the United States Hydrographic Office (R. 161); (12) Extracts of Monthly Minesweeping Reports issued by the British Navy (R. 175–176); (13) Payroll records of the *Cedar Mills* (R. 30); (14) Names and addresses of potential witnesses (R. 26–27, 170–171).

As indicated above, the Government made a full disclosure of the facts in its possession, withholding only copies of statements taken by agents of the Federal Bureau of Investigation at the direction of Government trial counsel. These statements, which are summarized at R. 170–171, were obtained after the commencement of the instant litigation in the preparation of the Government's defense. However, the Government did furnish petitioners the names and addresses of those persons making the statements in question (R. 26–27, 170–171, 222).

Petitioners then moved for judgment for failure to produce copies of these statements (R. 88–89). At the hearing (R. 98–151), a formal claim of privilege personally signed by the Attorney General was filed (R. 90–94). During the course of oral argument, petitioners, for the first time, moved for discovery pursuant to Admiralty Rule 32 (R. 95–97, 99–100, 102). An affidavit attempting to meet the good cause requirement of

Admiralty Rule 32, and the Government's counter affidavit, were filed after the hearing (R. 152–159, 160–176).

In opposition to petitioners' motion for judgment, the Government made three contentions: (1) Copies of statements of witnesses taken after suit is commenced may be obtained only by discovery under Admiralty Rule 32 upon a showing of good cause and not by interrogatories under Admiralty Rule 31; (2) Such copies of statements of witnesses are the work product of counsel within the scope of the protection accorded by *Hickman* v. *Taylor*, 329 U. S. 495; and (3) Statements contained in F. B. I. reports are privileged as confidential records of the Government.

The District Court ruled against the Government on all three grounds (R. 177–182). Since it held that the Government was required by Admiralty Rule 31 to produce copies of the statements in question, the District Court found it unnecessary to act upon petitioners' motion to produce those statements under Admiralty Rule 32. The court concluded, however, that it would be inappropriate to enter judgment by default against the United States. Instead it entered an interlocutory order precluding the United States from opposing petitioners' claims that their injuries were due to negligence on the part of the personnel of the vessel or the unseaworthiness of the vessel or both, reserving for further hearing

and determination the actual amount of damages to be awarded (R. 183–184).

On appeal, the Court of Appeals observed that the recitals in the decree conflicted with certain facts disclosed by the record (R. 192–193) and therefore vacated the decree and remanded the causes (R. 191–193). Upon remand, the District Court reformed its interlocutory decree and reentered it (R. 194–197). The interlocutory decree as amended and reentered was then reversed by the Court of Appeals, sitting *in banc* (R. 224).

The court below stated that the sole question "necessary to decide" was whether the District Court correctly held that petitioner could obtain the requested statements under Admiralty Rule 31 without a prior showing of good cause (R. 208). Examining the integrated scheme of the discovery rules, the Court of Appeals concluded that "a construction of the two Rules which would permit a party to obtain a copy of a document as of right under Admiralty Rule 31 or Civil Procedure Rule 33 but would compel him to show good cause under Admiralty Rule 32 or Civil Procedure Rule 34 to see the original would border on the capricious" (R. 219–220). The court also considered the opinion of this Court in *Hickman* v. *Taylor,* 329 U. S. 495, and held that it saw "no logical basis for making any distinction between statements of witnesses secured by a party's trial counsel personally in preparation for trial and

those obtained by others for the use of the party's trial counsel" (R. 217), that "in either situation, the rationale of the opinion of the Supreme Court in the Hickman case requires that the same showing of good cause for the production of such statements of witnesses should be made by the adverse party seeking copies of them. This necessarily means that their production is to be had under Civil Procedure Rule 34 (or Admiralty Rule 32) upon a showing of good cause rather than as a matter of right under Civil Procedure Rule 33 (or Admiralty Rule 31)" (R. 218).

Accordingly, the court below remanded the causes to permit the District Court to exercise its judgment as to whether petitioners have shown good cause under Admiralty Rule 32, and left open for later consideration the Government's claim of privilege (R. 221–222).

ARGUMENT

Following the reversal of his judgment by this Court in *Hickman* v. *Taylor* (329 U. S. 495), affirming the judgment of the Third Circuit Court of Appeals *in banc* (153 F. 2d 212), Chief Judge Kirkpatrick, the District Judge in this case, reiterated the so-called "Philadelphia rule" which sanctions the practice of obtaining copies of statements of witnesses in answer to interrogatories without a showing of good cause. *DeBruce* v. *Pennsylvania R. Co.*, 6 F. R. D. 403 (E. D. Pa.). The justification for continuation

of the rule was said to be found in a dictum of the court below in its *Hickman* opinion and in the fact that this Court, in the *Hickman* case, did not specifically disapprove or forbid the procedure. *Id.* at 405. In the instant case, the "Philadelphia rule" was specifically applied to limit the work product rationale of the *Hickman* case to statements taken by counsel personally.

In reversing the district court judgment on this point of practice, the court below found that the language and purpose of the relevant rules of procedure require a party to show good cause under Admiralty Rule 32 or Civil Procedure Rule 34 to compel the production of copies of statements of witnesses (R. 218–220).[3] The conclusion reached was fortified by a classification of the statements sought herein by petitioner as within the work product category of this Court's opinion in *Hickman* v. *Taylor*. Thus corrected, the procedure to be followed by the district courts under the supervision of the court below, with regard to the production of statements of witnesses, is brought into line with the substantially uniform practice followed throughout the Federal courts. We submit that the decision below is correct, the proper practice established, and that there is no occasion for review by this Court.

[3] In the course of its opinion, the court below has specifically withdrawn any support for the "Philadelphia rule" furnished by way of its dictum in the *Hickman* case (R. 218).

1. With virtual unanimity, the many District Courts which have considered the question here presented have taken the view that the production of statements of witnesses may be compelled only upon a showing of good cause therefor under Admiralty Rule 32 or its counterpart, Rule 34 of the Federal Rules of Civil Procedure.[4] *Curtis* v. *United States,* 27 F. Supp. 459, 460 (D. Mass.); *Creden* v. *Central R. Co. of New Jersey,* 1 F. R. D. 168 (E. D. N. Y.); *Gaumond* v. *Spector Motor Service,* 1 F. R. D. 364, 365 (D. Mass.); *The Poling Bros. No. 6,* 2 F. R. D. 336, 337 (E. D. N. Y.); *Roth* v. *Paramount Film Distributing Corporation,* 4 F. R. D. 302, 305 (W. D. Pa.); *American Tobacco Co. et al.* v. *S. S. Gouland-ris,* 1946 A. M. C. 1032 (S. D. N. Y.); *Walling* v. *Parry,* 6 F. R. D. 554, 556 (W. D. Pa.); *Hoffman*

[4] *Dugger* v. *Baltimore & O. R. Co.*, 5 F. R. D. 334 (E. D. N. Y.), and *Hayman* v. *Pullman Co.*, 8 F. R. D. 238 (N. D. Ohio) appear to be in accord with the court below. But see the following decisions of the same courts contra: *Creden* v. *Central R. Co. of New Jersey*, 1 F. R. D. 168 (E. D. N. Y.); *The Poling Bros. No. 6*, 2 F. R. D. 336, 337 (E. D. N. Y.); *Hoffman* v. *Chesapeake & O. Ry. Co.*, 7 F. R. D. 574 (N. D. Ohio); *Dellameo* v. *Great Lakes S. S. Co.*, 9 F. R. D. 30 (N. D. Ohio).

In a few cases, production of such statements has been required in connection with interrogatories filed under Admiralty Rule 31 or Civil Procedure Rule 33 but, in nearly all of those cases, it appears that the court directed their production only after satisfying itself that good cause was, in fact, shown. *Kennedy* v. *Mississippi Valley Barge Line Co.*, 7 F. R. D. 78 (W. D. Pa.); *Newell* v. *Capital Transit Co.*, 7 F. R. D. 732, 734 (D. D. C.); *Alfred Pearson & Co. (Pty.) Ltd.* v. *Hayes et al.*, 9 F. R. D. 210 (S. D. N. Y.).

v. *Chesapeake & O. Ry. Co.*, 7 F. R. D. 574 (N. D. Ohio); *Jones* v. *Pennsylvania R. Co.*, 7 F. R. D. 662, 663 (N. D. Ill.); *Bruen* v. *Huff*, 8 F. R. D. 322 (W. D. Pa.); *Dellameo* v. *Great Lakes S. S. Co.*, 9 F. R. D. 30 (N. D. Ohio); *Castro* v. *A. H. Bull & Co.*, 9 F. R. D. 84 (S. D. N. Y.); *Walsh* v. *Pullman Co.*, 9 F. R. D. 107 (D. Mass.); *Borgen* v. *Pennsylvania Greyhound Lines*, 9 F. R. D. 209, 210 (N. D. Ohio). See also Alexander Holtzoff, *Instruments of Discovery under Federal Rules of Civil Procedure*, 41 Mich. L. Rev. 205, 214, 218; Caskey and Young, *Some Limitations Upon Rule 33 of the Federal Rules of Civil Procedure*, 28 Va. L. Rev. 348, 356, 358; 2 Moore's *Federal Practice*, § 34.04, p. 2639.

Petitioners' contrary position, in urging the adoption of the unique "Philadelphia rule," is that "In the search for 'discovery facts,' a party may inquire by interrogatory of the adversary for the precise information furnished by any witness. * * * It follows from this that a request for a copy of a statement must likewise be disclosed in answer to an interrogatory under [Civil Procedure] Rule 33 because a copy of a document actually involves the disclosure of the substance of the statement and not the production of the document itself" (Pet. 26).

But as the court below points out (R. 219–221), petitioners' premise is in error. Under Civil Procedure Rule 33 and Admiralty Rule 31, a party has an absolute right to full disclosure of

all the relevant unprivileged facts in his adversary's possession, including information as to relevant statements and other documents in his control and the names and addresses of all persons having knowledge of relevant facts whom he or his agents have interviewed. The rules do not, however, confer an absolute right to identification of a particular witness as the source of specific facts. Having been informed by use of interrogatories as to the existence, nature and location of statements of witnesses, a party may then move for their production under Civil Procedure Rule 34 or Admiralty Rule 32 upon a showing of good cause.

Petitioners' assertion that this procedure serves only to emphasize needless technicalities (Pet. 32) ignores the basic distinction between Admiralty Rules 31 and 32.[5] Production of a document under Admiralty Rule 32, as contrasted with disclosure of information under Admiralty Rule 31, can be obtained only after good cause has been shown. To compel production of a copy of a document in answer to an interrogatory would virtually vitiate Admiralty Rule 32. For if a party can obtain a copy of a desired document as of right under Admiralty Rule 31, it is hardly likely that he would assume the burden under

[5] Petitioners' suggestion, that the "Philadelphia rule" is necessary to prevent "* * * dishonest and incomplete answers * * *" to interrogatories (Pet. 9, 25, 33–34) is disposed of in *Hickman* v. *Taylor*, 329 U. S. at 509.

Admiralty Rule 32 of having to show good cause for its production only to assume the additional burden of making a copy of it at his own expense.[6] As the court below pungently comments (R. 219–220), petitioners' construction of the rules "border[s] on the capricious * * * it would require a showing of good cause only in case a party desired visually to examine the document as to its form but not when he sought information as to its contents. In common experience, however, the contents of most documents are of much more importance to the parties than their physical form."[7] And Admiralty Rule 32 itself recognizes its utility as a means of obtaining copies; it is not limited to production for inspection as

[6] As noted below (R. 219, fn. 9), "The task of preparing copies of papers and documents called for under the discovery procedure may at times be a very burdensome one. See, for example, *Niagara Duplicator Co.* v. *Shackleford*, C. A. D. C. 1947, 160 F. 2d 25; *Cinema Amusements* v. *Loew's Inc.*, D. C. Del. 1947, 7 F. R. D. 318, 321."

[7] As to petitioners' repeated suggestion that the logical conclusion of the decision below precludes from disclosure any information contained in a writing because it would be tantamount to production of the writing (Pet. 9, 10, 11, 17, 32), little comment is needed. That an adversary is not required, absent a showing of good cause, to disclose what a particular witness has stated does not, of course, mean that he is not obliged to disclose all the relevant facts and the names of the persons from whom the facts were obtained. Whatever the proper procedure may be where all the facts are ascertained from a single witness whose identity has been disclosed, in a case such as the one at bar the result pointed to by petitioners is imaginary.

petitioners appear to suggest (Pet. 17). See Appendix, *infra*, p. 18.

2. Alternative support for the result reached by the court below is supplied by the work product rationale of *Hickman* v. *Taylor*, *supra*, under which the statements here in question, taken by agents of the Federal Bureau of Investigation at the direction of Government counsel after suit was commenced, are protected from discovery in the absence of a showing of good cause.

As we understand the *Hickman* decision, no valid distinction can be drawn between statements obtained by counsel himself and those taken by his agents,[8] who may or may not be lawyers, under his direction, after suit has been filed and in preparation for trial. Statements of witnesses are not customarily stenographic transcriptions. Whether taken by counsel, or by his assistants, they are generally summaries in the interviewer's own language of his impression of what the witness has said. In each case, the questions directed at the witness are permeated with counsel's legal theories and analysis of what is material and relevant, and the statements ultimately become part of counsel's work file. In each case, the practical effect of permitting their discovery without good cause is to reduce a trial to a battle of statements where witnesses are not cross-examined as to the facts brought out on

[8] We are not here concerned with "train crew reports" and the like. Cf. Pet. 28. Reports of this nature were made available to petitioners. See *supra*, pp. 4–5.

direct examination but as to what was said in prior statements. Cf. Jackson, J., concurring in *Hickman* v. *Taylor*, supra, at 516–517.

3. We respectfully suggest that, in any event, this case is not yet ripe for certiorari. Petitioners seek review herein of an interlocutory order which remands to the district court the question whether petitioners have, in fact, shown good cause under Admiralty Rule 32 for the production of copies of witnesses' statements taken after suit was commenced. In the event that the district court holds that petitioners have failed to establish good cause, such ruling may become academic if petitioners prevail on the merits. Should final judgment be awarded against petitioners, the denial of the writ at this stage would not limit appellate review of the whole case to determine whether reversible error was committed at any stage. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418; *Hamilton Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258; *Panama R. R. Co.* v. *Napier Shipping Co.*, 166 U. S. 280, 284. On the other hand, should the district court hold that petitioners have established good cause, the court below would then reach the question here left open, *i. e.*, whether such statements are privileged by statute and regulation as confidential records of the Government. Review of the case at this time would deprive the Court of a complete record as the basis for consideration and decision of all preliminary questions.

These considerations strongly support the application to this case of the policy of this Court which limits certiorari review to final decrees. Concededly, the writ may issue to review interlocutory decrees in extraordinary circumstances. Cf. *Forsyth* v. *Hammond,* 166 U. S. 506, 514–515; *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403, 408; *Landis* v. *North American Co.,* 299 U. S. 248, 254. No such circumstances are presented by this case. On the contrary, the occasion for the application of the traditional policy is particularly clear here where the result reached by the court below is in accord with substantially all decided cases on the same question.[9] *Supra,* pp. 10–11.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1950.

[9] Compare *Hickman* v. *Taylor* where, although review was sought of a final order adjudging defendants in contempt, certiorari was initially denied (327 U. S. 808) and then granted on petition for rehearing (328 U. S. 876) because of "the importance of the problem, which has engendered a great divergence of views among district courts * * *." 329 U. S. 495, 500.

APPENDIX

Admiralty Rule 31. Interrogatories to Parties

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party.

Admiralty Rule 32. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing

Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1)

order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

U. S. GOVERNMENT PRINTING OFFICE: 1938

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SUPREME COURT OF THE UNITED STATES.

October Term, 1949. No. 734.

NATHAN R. ALLTMONT and CHARLES O'NEILL,
Petitioners,

v.

UNITED STATES OF AMERICA, UNITED STATES MARITIME COMMISSION,
Respondents.

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND AMICUS CURIAE BRIEF ON BEHALF OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS (READING COMPANY, PENNSYLVANIA R. R. LINES EAST, HUDSON & MANHATTAN R. R. CO. AND LONG ISLAND R. R.), ORDER OF RAILWAY CONDUCTORS (PENNSYLVANIA R. R. LINES EAST) AND RAILWAY EMPLOYEES' DEPARTMENT, A. F. OF L.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of the Brotherhood of Locomotive Engineers (Reading Company, Pennsylvania R. R. Lines East, Hudson & Manhattan R. R. Co. and Long Island R. R.), the Order of Railway Conductors (Pennsylvania R. R. Lines

East) and the Railway Employees' Department, A. F. of L., respectfully represents:

These unions have filed this petition for leave to intervene in these proceedings because of the extreme importance and frequency of incidence of the issues raised in this case. Inasmuch as thousands of railroad workers are injured annually and suits are instituted in the United States District Courts under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51 et seq., and under the various Safety Appliance Laws, 45 U. S. C. A., Sections 1-16 and 23, inclusive, the problem of preparing such cases for trial is ever present.

The Federal Rules of Civil Procedure pertaining to discovery admittedly were written with a view toward eliminating the adversary system. There were directed toward facilitating and assuring the ascertainment of all facts pertaining to each case, so that causes of action would be decided not upon mere superiority of opportunity to investigate the factual situation, but upon all of the facts, by whomever they might have been developed.

In that manner it was hoped that each case would be fairly and squarely tried upon all of the proper and relevant evidence known to all of the parties in advance of trial, thereby eliminating all elements of surprise in the actual trial of the case.

The Congress of the United States committed unto this Court the responsibility for the development of rules of practice and procedure which would provide the greatest assurance of the true administration of justice in the courts of the United States, 28 U. S. C. A., Sections 2071, 2072. Justice is best obtained where there is complete revelation of all the facts and circumstances relating to an occurrence or incident, without regard to where the chips may fall. Complete revelation can be obtained only if all facts that anyone has learned by any means, regarding a given occurrence, are made available for hearing by the court and jury, or by any other determining body, limited only by the rules

of evidence on relevancy, competency or privilege ("work product" of trial counsel).

Until the decision in the instant case, the district courts within the Third Circuit had adhered to the principle that justice is best obtained by making all of the parties disgorge whatever information had been gleaned, from whatever source, and that all other persons having information should be obliged to do likewise. This includes statements taken by the operating and/or claim departments of the defendants and of the parties themselves, whether plaintiff or defendant. That principle was laid down in *Nedimyer v. Pennsylvania R. Co.*, 6F. R. D. 21 (1946) before the decision in *Hickman v. Taylor*, 329 U. S. 495 (1946), and again in *DeBruce v. Pennsylvania R. Co.*, 6F. R. D. 403 (1947)* (after the decision in the *Hickman* case, supra,) and that principle has been followed without exception or dilution up to the present time.

American industry today is not the product of individuals working alone, but rather of thousands of men working together, be it in a factory, on a railroad, at sea, or in a large business organization. Ordinarily, one man is not and can not be familiar with all of the facts leading up to an incident, an occurrence, or indeed a catastrophe, that results in the serious maiming of a husband or a father, or indeed in the loss of life of such a breadwinner. The incipience of the tragedy may have been many months before, hundreds of miles away.

The Congress of the United States, in cases under the

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* Before the **DeBruce** case was decided, Judge Kirkpatrick called a conference of practically all of the local lawyers active in cases under the Federal Employers' Liability Act and the Jones Act. At that round table conference, he had this to say, in almost these words: "For many years prior to ascending the bench, I represented many of the insurance casualty companies, the railroads and interurban lines in the city of Easton, Pennsylvania. Much too often did I return to my office with the unhappy feeling that I had obtained a non-suit, a verdict for the defendant or an n. o. v. in cases where, had the plaintiff been able to get the information that was lodged in the defendant's file, some poor widow or maimed plaintiff would have had a different result. So long as I am on the bench, I shall interpret these rules in this court to prevent the recurrence of such injustice."

Jones Act, 46 U. S. C. A., Sec. 688, and under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51 et seq., has laid down a requirement of negligence as a basis for recovery. Men working alone, at sea on a vessel at night, or out in railroad yards at night, are later found dead, with no means available to the bereaved families for ascertaining the circumstances which might establish liability under these statutes, other than by utilization of the rules of discovery promulgated by this Court.

This Court is not unaware of the practical aspects of the preparation of a case for presentation and trial before a court and jury. It is the investigation, the discovery of facts, the identity and locating of witnesses, that develops liability; but without these tools of discovery, counsel may be the most learned in law and yet find himself helpless to prepare his case. Members of the working crew may have separated and spread all over the country or indeed the world; the defect in the equipment may have been corrected, repaired or removed; the cause of the accident may have been a physical fact to which counsel may have no clue nor any reason to suspect. The employer, however, has all this information. It has been developed by the employer's superiority of opportunity to obtain facts. These facts have usually been reduced to writing in statements taken from employees—statements taken because the very operation of the railroad or vessel requires it. They may have been taken for accounting, replacement or engineering purposes, let alone for the preparation of a defense in the prospective law suit.

Illustrative of this, may we give the Court a practical situation. In *Sweeting v. Pennsylvania R. Co.*, 142 F. 2d 611 (1944), the widow of a hostler who was found in flames on the ground alongside his electric locomotive, near a roundhouse, retained counsel a few months before the running of the statute of limitations. She was utterly unaware of any of the facts leading up to the accident. There were no eye-witnesses. The case was seemingly hopeless from

the viewpoint of the widow. She was to be left penniless, with a child of nine. Such facts as were conceded by the employer pointed only to the decedent's own conduct as the sole cause of the accident. Finally, copies of statements were obtained. In the statement of one anguished fellow employee was the comment: "If he had to die, why did he have to get two shots?" This apparently unconnected, meaningless phrase, discovered only because it was in the written statement made to the operating department, developed later into proof that without proper investigation as to the cause of a short circuit in the area where the electric locomotive was known to be, the power director had restored the current, thereby causing the flames from which the decedent died. Here indeed was a ground of liability the existence of which no lawyer, however ingenious, could by any stretch of the imagination have suspected, had he not had such a lead as was found in that statement, obtained under the federal discovery rules.

Is this avenue of discovery (indeed the most important available to the injured employee) to be taken away from him by legalistic, conceptualistic reasoning and interpretation of rules, which would mean that this court had not intended at all to provide discovery in the true sense of the word? The opinion of the court below would operate to reduce to rivulets what had been the teeming rivers of information that flowed from the heretofore existing law in this Circuit following the opinion of Judge Kirkpatrick in *DeBruce v. Pennsylvania R. Co., supra.*

Complete justice was being administered in these courts. It did not always mean that plaintiff would win (see *Eckenrode v. Pennsylvania R. Co.,* 335 U. S. 329 (1948), but it meant that he would win when he was entitled to win. His assurance of recovery, as provided by these two great statutes (the Jones Act and the Federal Employers' Liability Act) should not be given with one hand by Congress and taken away with the other, by the courts, through narrow, ritualistic concepts of legal procedure and practice.

Moreover, we now see looming before us an insuperable obstacle in the phrase "good cause," proof of which is necessary under Rule 34 before statements can be obtained. The quantitative and qualitative meaning of "good cause" will be subject to the whim, attitude and disposition of a particular judge on the particular day when the motion under Rule 34 is presented.

Legislation such as the Federal Employers' Liability Act and the Jones Act, conceived in a benign atmosphere, and heretofore supposedly invigorated by a liberal interpretation of the federal rules of discovery, must not be permitted to be withered by the wintry approach of the court below—an approach which would permit technical peccadilloes and whimsicalities to prevent truth from emerging supreme.

Either the court below was gravely in error in its interpretation of Rules 26 and 33, or this court has failed to provide a fully developed system of discovery to implement the administration of justice. We believe this court intended to provide absolute, total discovery; that it will carefully scrutinize, review and reverse any decision that tends directly or indirectly towards retrogression instead of progress in this interest.

It is respectfully suggested that this court must seize this opportunity to challenge the decision below, as it may never again have an opportunity to review this question, since decisions on the rules are of an interlocutory nature. American workingmen throughout this nation must be given this protection, and this court must be ever vigilant to the end that legislation intended to provide compensation for injury or death shall not have its remedial objectives emasculated by procedural stricture.

We of railroad labor are very happy indeed with the Federal Employers' Liability Act and its interpretation by this court since the case of *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54 (1942). The federal rules of discovery as heretofore interpreted have made this statute the *satis-*

factory and *adequate* remedy it has proven to be since the amendments of 1939.

Respectfully submitted,

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